

FILED 06 JUN 09 1453USDC-ORP

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DENIS GERARD McALEESE; LUCILLE  
McALEESE; and McALEESE, INC.,

CV 03-865-BR

OPINION AND ORDER

Plaintiffs,

v.

DEAN KALIVAS aka Dean Kalivas,  
Attorney at Law,

Defendant.

**MARC K. SELLERS**

Schwabe Williamson & Wyatt PC  
1211 SW Fifth Avenue, Suite 1800  
Portland, OR 97204  
(503) 796-2917

Attorneys for Plaintiffs

**DEAN KALIVAS**

Attorney at Law  
1420 Fifth Ave, #2200  
Seattle, WA 98101  
(206) 369-7339

Defendant, *Pro Se*

**BROWN, Judge.**

This matter comes before the Court on Plaintiffs' Motion for an Order Awarding Attorney's Fees, Costs, and Expenses (#83).

For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion and awards attorneys' fees to Plaintiffs in the amount of **\$115,802.62**. The Court also awards costs to Plaintiffs in the amount of **\$14,512.22**.

**BACKGROUND**

On June 27, 2003, Plaintiffs filed a Complaint alleging Defendant, acting as their attorney and as a fiduciary, breached his fiduciary duties, committed legal malpractice, and engaged in fraud and racketeering in connection with various business ventures. Plaintiffs sought compensatory, treble, and punitive damages as well as their costs and attorneys' fees. Plaintiffs served the Complaint on July 9, 2003.

On August 1, 2003, Plaintiffs moved for an Entry of Default Judgment due to Defendant's failure to appear within 20 days. The Motion and supporting documents were in order, and the Clerk of Court, therefore, entered Defendant's default of record on

August 8, 2003. The amount of Plaintiffs' damages, however, was not readily ascertainable from the record. On August 13, 2003, the Court, therefore, set a *prima facie* hearing on the issue of damages for August 26, 2003.

In the meantime, Defendant filed an Answer to Plaintiffs Complaint on August 13, 2003, without leave to file his Answer late.

Defendant did not appear at the *prima facie* hearing, and he informed the Court that he did not receive notice of the proceeding in time to attend. The Court continued the hearing to September 22, 2003, to ensure Defendant had sufficient notice and an opportunity to be heard.

On September 12, 2003, Defendant filed a Motion for Leave to File Past-Due Answer and to Vacate Default.

On September 22, 2003, Defendant appeared *pro se* for the *prima facie* hearing. Plaintiffs offered testimony and other evidence to support their claims for damages, and Defendant cross-examined witnesses and made factual and legal arguments. Defendant's Motion for Leave to File Past-Due Answer, however, was not supported by any pertinent legal analysis, and Plaintiffs had not filed a response to Defendant's Motion for leave at the time of the hearing. Accordingly, the Court set a briefing schedule and a date for another hearing to take place on January 18, 2004. Due to inclement weather and other scheduling

problems, however, that hearing was continued to March 15, 2004.

On March 17, 2004, the Court issued an Opinion and Order in which it denied Defendant's Motion to File Past-Due Answer and declined to set aside the Default Judgment on the ground that the entry of default was the result of Defendant's culpable conduct.

Thereafter, the parties attempted to settle the case, but it became apparent they were unable to do so. The Court then ordered the parties to proceed to trial.

A trial to the Court was scheduled to begin on May 31, 2005, as to the issue of the amount of damages sustained by Plaintiffs as a result of Defendant's actions. The Court received Plaintiffs' evidence, but Defendant did not appear at trial. On the same day, however, the Court received a letter from Defendant in which he informed the Court he had filed Chapter 13 bankruptcy proceedings in the United States Bankruptcy Court for the District of Nevada on May 27, 2005. The Court, therefore, held in abeyance its resolution of the matter.

On June 6, 2005, Plaintiffs reported to the Court that an automatic stay was in effect as of May 27, 2005, because of Defendant's bankruptcy case, and the stay would prevent the Court from entering a judgment in this matter until the stay was lifted. Plaintiffs obtained a change of venue for Defendant's bankruptcy to the United States Bankruptcy Court for the Western District of Washington. The Bankruptcy Court ultimately ordered

relief from the automatic stay so this Court could enter a judgment in this case.

On March 17, 2006, after notice that the Bankruptcy Court had lifted the stay, this Court entered Findings of Fact and Conclusions of Law in which the Court concluded Defendant's actions entitled Plaintiffs to redress under the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, and Plaintiffs were entitled to recover threefold damages and reasonable attorneys' fees and costs pursuant to 18 U.S.C. § 1964(c). The Court entered a Judgment awarding Plaintiffs \$4,010,050.50 in damages and reasonable attorneys' fees and costs.

On April 10, 2006, Plaintiffs filed a Motion for an Order Awarding Attorneys' Fees, Costs, and Expenses. Defendant did not file a response to the Motion.

#### **DISCUSSION**

Plaintiffs seek attorneys' fees in the amount of \$128,350.75 incurred in this action, \$21,544.53 incurred in the Nevada bankruptcy action, and \$22,792.77 incurred in the Washington bankruptcy action. In addition, Plaintiffs seek costs in the amount of \$18,504.66 in connection with this action, \$2,070.53 related to the Nevada bankruptcy action, and \$1,295.89 related to the Washington bankruptcy action.

**I. This Court Will Not Award Attorneys' Fees or Costs to Plaintiffs for the Nevada and Washington Bankruptcy Actions**

18 U.S.C. § 1964(c) provides in pertinent part:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Emphasis added.

Plaintiffs seek attorneys' fees and costs under § 1964 for the Nevada and Washington bankruptcy actions in addition to this matter. Section 1964, however, only authorizes fees incurred for litigating actions that address violations of RICO. In other words, the statute allows fees for the cost of "the suit," but not for related matters. Moreover, Plaintiffs do not cite nor can this Court find any authority that allows the Court to award attorneys' fees under § 1964 that were incurred in bankruptcy actions.

Accordingly, the Court denies Plaintiffs' request for an award of award attorneys' fees incurred as a result of the Nevada and Washington bankruptcy actions.

**II. Plaintiffs Are Entitled to Reasonable Attorneys' Fees and Costs for This Matter.**

As noted, 18 U.S.C. § 1964(c) mandates an award of attorneys' fees and costs for Plaintiffs who succeed on RICO claims.

**III. Plaintiffs Are Entitled to Attorneys' Fees of \$115,802.62.**

**A. Standards**

The Ninth Circuit has adopted a lodestar/multiplier approach for assessing the amount of reasonable attorneys' fees. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9<sup>th</sup> Cir. 1993). The lodestar/multiplier analysis is made up of two parts. The court first calculates the lodestar amount by multiplying the number of hours the court finds the prevailing party reasonably expended on the litigation by a reasonable hourly rate. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9<sup>th</sup> Cir. 1996). The party seeking the award of fees must submit evidence to support the number of hours worked and the rates claimed. *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9<sup>th</sup> Cir. 2000). "A district court should exclude from the lodestar amount hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary.'" *Id.* (citation omitted).

To determine the lodestar, the court may consider the following factors: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9<sup>th</sup> Cir. 1975). A rote recitation of the relevant factors is unnecessary as long as the court adequately explains the basis for the award of attorneys' fees. *McGinnis v. Kentucky Fried Chicken of Cal.*, 51 F.3d 805, 809 (9<sup>th</sup> Cir. 1995).

After determining the lodestar amount, the court assesses whether it is necessary to adjust the lodestar upward or downward based on factors that are "not already subsumed in the initial calculation of the lodestar." *Morales*, 96 F.2d at 363-64. The lodestar amount is presumed to be the reasonable fee, "and thus a multiplier may be used to adjust the lodestar amount upward or downward only in rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts that the lodestar amount is unreasonably low or unreasonably high." *Id.* (citations and internal quotations omitted).

#### **B. Analysis**

Plaintiff seeks attorneys' fees in the amount of \$128,350.75, which represent approximately six hundred hours at various rates for 28 individuals. Plaintiff submitted the Affidavit of Marc K. Sellers together with fee statements that

itemize the hours spent on this matter. Although Defendant did not file a response or objections to the Motion, the Court has an independent duty to review the petition for reasonableness. See *Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9<sup>th</sup> Cir. 1993).

As a preliminary matter, the Court notes the total amount of fees requested by Plaintiffs in their Motion, which is supported by the Affidavit of Marc Sellers and Exhibit A to that Affidavit, do not match the amount the Court calculated for the requested hours at the requested rates. Although Plaintiffs requested total fees of \$128,350.75, the Court calculated the total amount of fees for the number of requested hours at the requested rates as \$133,499.69. See Exhibit 1 to this Opinion and Order. The Court, nevertheless, assumes \$128,350.75 is the amount Plaintiffs believe is appropriate regardless of the discrepancy between Plaintiffs' calculation and the underlying data.

To determine the reasonable hourly rate, this Court uses the most recent Oregon State Bar Economic Survey published in 2002 as its initial benchmark. Attorneys may argue for higher rates based on inflation, specialty, or any number of other factors. Indeed, in *Bell v. Clackamas County*, the Ninth Circuit criticized the use of outdated economic surveys that might not reflect the prevailing rate at the time the award is made. 341 F.3d 858, 868-89 (9<sup>th</sup> Cir. 2003). Even though this matter was time-consuming for Plaintiffs, the Court finds there is not any

justification to award any of the attorneys who performed services in this action on behalf of Plaintiffs a greater hourly rate than the benchmark set by the 2002 Oregon State Bar Economic. To adjust for the four years between publication of the 2002 Oregon State Bar Economic Survey and the award in this case, however, the Court adds an annual three percent (3%) inflation factor to the appropriate Oregon State Bar Survey hourly rate for each provider of legal services.

Plaintiffs did not provide the Court with any information that identified the experience or skill levels of the 28 individuals who billed time on this matter. The Court, therefore, reviewed the Oregon State Bar Directory for information on the individuals who are members of the Oregon State Bar. A number of individuals for whom Plaintiffs request fees, however, are not members of the Oregon State Bar. The Court, therefore, does not have any information on those individuals as to the number of years of their legal experience, their skill levels, or their practice areas. Accordingly, the Court declines to award the fees requested for the following individuals: Russel Robertson, Steven Miller, Alexander Williams, Deric Luoto, Jacqueline Bollinger, Kathleen Fowzer, Kathy Severns, Loridel T. Buss, Mark D. Lucwick, Mary O'Brien, Tina S. Granados, Rosemary S. Cox, and Jill Chickering.

Moreover, the Court is able to determine with certainty

only that the attorneys listed in the Oregon State Bar Directory have the number of years of experience reflected in their dates of admission to the Oregon State Bar. In other words, the Court is unable to determine whether any of these attorneys were admitted earlier to the Bar in other jurisdictions and, therefore, have more experience.

Alex Poust had between 11 and 14 years of experience during the course of this matter. According to the Oregon Bar Economic Survey, the 75<sup>th</sup> percentile of Portland attorneys with this level of experience bills at an average hourly rate of \$225. Absent any information in the record as to Poust's area of expertise or practice history, the Court concludes a reasonable rate for Poust's services adjusted for inflation is \$246 per hour.

Donald Krahmer, Jr., had between 15 and 18 years of experience and Mark Stayer had between 18 and 21 years of experience during the course of this matter. According to the Oregon Bar Economic Survey, the 75<sup>th</sup> percentile of Portland attorneys with this level of experience bills at an average hourly rate of \$253. Absent any information in the record as to areas of expertise or practice history of either Krahmer or Stayer, the Court concludes a reasonable rate for their services adjusted for inflation is \$276 per hour.

Gary Roberts had between 29 and 32 years of experience,

Jan Kitchel had between 25 and 28 years of experience, and Marc Sellers had between 24 and 27 years of experience during the course of this matter. According to the Oregon Bar Economic Survey, the 75<sup>th</sup> percentile of Portland attorneys with this level of experience bills at an average hourly rate of \$275. Absent any information in the record as to the areas of expertise or practice history of Roberts, Kitchel, or Sellers, the Court concludes a reasonable rate for their services adjusted for inflation is \$300 per hour.

Amanda Gamblin and Michael Furlong each had between one and four years of experience; Carrie Wood, Dan Eller, and Ryan Steen each had between one and two years of experience; and Jeff Totten had one year of experience during the course of this matter. According to the Oregon Bar Economic Survey, the median hourly rate of Oregon attorneys with 0-3 years experience is \$145. The Court concludes the median hourly rate of \$158 per hour adjusted for inflation is appropriate in light of the relative lack of experience and the absence of any additional factors identified by Plaintiffs to justify an hourly rate in excess of the median rate for Gamblin, Furlong, Wood, Eller, Steen, or Totten.

Eric Smith and Mario Madden each had between four and seven years of experience during the course of this matter. According to the Oregon Bar Economic Survey, the 75<sup>th</sup> percentile

of Portland attorneys with this level of experience bills at an average hourly rate of \$185. Absent any information in the record as to the areas of expertise or practice history of either Smith or Madden, the Court concludes a reasonable rate for their services adjusted for inflation is \$202 per hour.

Jeffrey R. Jones had between two and five years of experience during the course of this matter. According to the Oregon Bar Economic Survey, the median hourly rate of Oregon attorneys with 0-3 years experience is \$145 and rate for attorneys with 4-6 years experience is \$158. The Court concludes the median hourly rate of \$166 per hour adjusted for inflation is appropriate in light of Jones's relative lack of experience and the absence of any additional factors identified by Plaintiffs to justify an hourly rate in excess of the median rate.

In summary, after applying a three (3%) percent per year inflation factor to the 2002 Oregon State Bar Economic Survey hourly rates and rounding to the nearest dollar, the Court concludes the Plaintiffs are entitled to attorneys' fees at the following hourly rates:

Alex Poust	- \$246.00
Donald Krahmer, Jr.	- \$276.00
Gary Roberts	- \$300.00
Jan Kitchel	- \$300.00
Mark Stayer	- \$276.00
Marc Sellers	- \$300.00
Amanda Gamblin	- \$158.00
Carrie Wood	- \$158.00
Dan Eller	- \$158.00
Eric Smith	- \$202.00

Jeffrey R. Jones	- \$166.00
Michael Furlong	- \$158.00
Mario Madden	- \$202.00
Ryan Steen	- \$158.00
Jeff Totten	- \$158.00

The Court disallows attorneys' fees requested in excess of these hourly rates.

Accordingly, the Court finds the Plaintiff is entitled to an award of attorneys' fees of **\$115,802.62** as set forth in Exhibit 1 to this Opinion and Order.

**IV. Plaintiffs Are Entitled to Costs in the Amount of  
\$14,512.22.**

**A. Standards**

Absent a showing of circumstances not relevant here, an award of costs is generally governed by federal law. See *In re Merrill Lynch Relocation Mgt., Inc.*, 812 F.2d 1116, 1120 n.2 (9<sup>th</sup> Cir. 1987) (dictum). Accordingly, the Court finds federal law governs the award of Costs in this case.

Title 28 U.S.C. § 1920 allows a federal court to tax specific items as costs against a losing party pursuant to Federal Rule of Civil Procedure 54(d)(1). Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers

necessarily obtained for use in the case;  
(5) Docket fees under section 1923 of this title;  
(6) Compensation for court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The court has broad discretion to allow or to disallow a prevailing party to recoup costs of litigation. The court, however, may not tax costs beyond those authorized by § 1920. *Frederick v. City of Portland*, 162 F.R.D. 139, 142 (D. Or. 1995).

#### **B. Analysis**

As noted, Defendant did not file any objection to Plaintiffs' requested costs. Nevertheless, the Court must examine the requested costs to determine whether they are taxed properly under § 1920.

Plaintiffs requested \$417.44 for the cost of "online research." The Court declines to award costs for computerized legal research because such costs reasonably should be included in the overhead and hourly rates of Plaintiffs' counsel. In addition, Plaintiffs seek \$1,750.00 for "accounting fees" and \$1,825.00 for "miscellaneous . . . accounting fees." The Court declines to award these costs because it cannot identify any basis for awarding accounting fees under § 1920. Plaintiffs also requested costs for, among other things, deposition transcripts,

court reporter fees, and filing fees, which are allowable under § 1920 and which the Court finds to be reasonable.

The Court, therefore, awards costs to Plaintiffs in the amount of **\$14,512.22**.

**CONCLUSION**

For these reasons, the Court **GRANTS** Plaintiffs' Motion for an Order Awarding Attorney's Fees, Costs, and Expenses (#83) and **AWARDS** attorneys' fees to Plaintiffs in the amount of **\$115,802.62** and costs in the amount of **\$14,512.22**.

IT IS SO ORDERED.

DATED this 9<sup>th</sup> day of June, 2006.

  
ANNA J. BROWN  
United States District Judge

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***MCAleese v. Kalivas***  
**Motion for Attorneys Fees**

Attorney	Rate	Hours	Fee	Bar No.	Years Exp.	2002 Survey Rate 75 <sup>th</sup> %	Updated Rate	Disallowed Fees
Alex Poust	290.00	1.80	522.00	92515	11-14	225	245.86	79.45
Donald Krahmer, Jr.	290.00	3.50	1,015.00	88066	15-18	253	276.46	47.39
Gary Roberts	301.73	0.40	120.69	74273	29-32	275	300.5	0.49
	301.72	0.50	150.86					
Jan Kitchel	320.00	0.20	64.00	78471	25-28	275	300.5	3.90
Mark Stayer	260.00	1.25	325.00	85388	18-21	253	276.46	
Marc Sellers	285.00	7.40	2,109.00	79107	24-27	275	300.5	
	271.53	19.95	5,417.02					
	271.52	16.70	4,534.38					
	271.50	1.00	271.50					
	270.00	46.60	12,582.00					
	265.00	187.40	49,661.00					
	255.00	129.85	33,111.75					
Amanda Gamblin	205.00	0.60	123.00	02136	1-4	145	158.45	27.93
	180.00	1.00	180.00			145	158.45	21.55
Carrie Wood	160.00	0.90	144.00	04516	1-2	145	158.45	
	89.79	5.60	502.82			145	158.45	
Dan Eller	200.00	0.60	120.00	04281	1-2	145	158.45	24.93
Eric A. Smith	191.07	2.80	535.00	99112	4-7	185	202.15	
	175.00	0.20	35.00			185	202.15	
	165.00	16.60	2,739.00			185	202.15	
	40.22	2.50	100.55			185	202.15	
Jeffrey R. Jones	195.00	0.70	136.50	01309	2-5	151.5	165.55	20.62
	190.00	1.70	323.00			151.5	165.55	41.57

Exhibit 1

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Attorney	Rate	Hours	Fee	Bar No.	Years Exp.	2002 Survey		Updated Rate	Disallowed Fees
						Rate	Rate		
Michael Furlong	190.00	9.50	1,805.00	02308	1-4	145	158.45	299.77	
Mario J. Madden	231.28	0.50	115.64	99316	4-7	185	202.15	14.56	
Ryan P. Steen	150.00	21.60	3,240.00	03466	1-2	145	158.45		
Russel Roberston	190.00	0.20	38.00	UNKNOWN					5,719.90
	175.99	5.70	1,003.14						
	175.98	4.60	809.51						
	175.96	0.25	43.99						
	175.95	0.20	35.19						
	175.90	0.10	17.59						
	175.00	17.10	2,992.50						
	160.00	1.00	160.00						
	158.97	3.50	556.40						
	158.95	0.40	63.58						
Steven Miller	175.00	0.70	122.50	UNKNOWN					122.50
Alexander Williams	110.00	0.30	33.00	UNKNOWN					33.00
Deric Luoto	140.78	0.50	70.39	UNKNOWN					942.12
	140.00	0.50	70.00						
	127.17	0.30	38.15						
	127.16	0.50	63.58						
	125.00	5.60	700.00						
Jacqueline Bollinger	130.00	8.50	1,105.00	UNKNOWN					1,105.00
Kathleen Fowzer	110.00	2.90	319.00	UNKNOWN					319.00
Kathy Severns	115.00	2.10	241.50	UNKNOWN					291.50
	100.00	0.50	50.00						
Loridel T. Buss	65.00	0.43	27.95	UNKNOWN					27.95
Mark D. Ludwick	100.00	29.85	2,985.00	UNKNOWN					2,985.00
Mary O'Brien	130.00	0.50	65.00	UNKNOWN					65.00

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Attorney	Rate	Hours	Fee	Bar No.	Years Exp.	2002 Survey Rate	Updated Rate	Disallowed Fees
Tina S. Granados	140.00	1.70	238.00	UNKNOWN				238.00
Jeff Totten	125.00	12.40	1,550.00	05399	1	145	158.45	
Rosemary S. Cox	90.00	1.00	90.00	UNKNOWN				90.00
Jill S. Chickering	90.00	0.30	27.00	UNKNOWN				27.00
		582.98	133,499.69					12,548.13
<b>Fee Requested</b>			<b>128,350.75</b>					
<b>Total Fees Allowed</b>			<b>115,802.62</b>					

	Hours	Fees
Aff'd Amounts	607.28	128,350.75
Difference	-24.3	5,148.91
Exhibit A	551.28	128,350.75
Difference	31.7	5,148.94

Cost Bill

Online Research	417.44
Accounting Fees	1,750.00
Unidentified Misc.	1,825.00
Total Disallowed	3,992.44
Costs Requested	18,504.66
<b>Total Allowed</b>	<b>14,512.22</b>

Exhibit 1